

**Tang ZS. Declining Jurisdiction in Chinese Courts by Forum Non Conveniens.
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<Art_Title>Declining Jurisdiction by *Forum Non Conveniens* in Chinese Courts

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<Abstract>*Compared to the relatively comprehensive and broad jurisdictional bases granting competence to Chinese courts, Chinese statutes are almost silent in rules concerning declining jurisdiction. In the absence of clear legislative provisions, Chinese judicial practice plays a pioneering role in improving Chinese law in this area. This article systematically examines Chinese law and practice in forum non conveniens. It shows that discretionary power to decline jurisdiction for “convenience” has already been accepted in judicial practice, regardless of the absence of legislative support. The judge-driven development has contributed greatly to this area of law, and Chinese courts, especially courts in economically developed areas, are no longer zealously competing with foreign courts in taking civil jurisdiction. They have paid more attention to procedural efficiency and justice, as well as international comity between countries. Further improvement and modernisation require more systematic legislation, more appropriately designed rules and guidance and better training and education for Chinese judges.*

1. Introduction<H1>

A court that is competent to hear a cross-border dispute may nevertheless decide not to exercise jurisdiction.¹ A court may decline jurisdiction if the local forum is inappropriate or it is more appropriate for a foreign court to hear the dispute due to

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¹ See JJ Fawcett, “General Report” in JJ Fawcett (ed), *Declining Jurisdiction in Private International Law* (Oxford, Oxford University Press, 1995).

proximity and convenience of the trial,² or one of the parties has already brought the same or closely related action in another country,³ or the parties have entered into a conflicting choice of court agreement or arbitration agreement.⁴ If taking jurisdiction is based on the state's assertion of sovereignty over activities that have connections with, or effects in, the country,⁵ declining jurisdiction shows a country's intention to restrain its jurisdictional power in order to achieve procedural justice in individual cases or to promote international cooperation and international comity.⁶

Doctrines and rules concerning declining jurisdiction, however, are undeveloped in China. Compared to relatively comprehensive and broad jurisdictional bases granting competence to Chinese courts,⁷ Chinese statutes are almost silent in rules concerning declining jurisdiction. In the absence of clear legislative provisions, the traditional view is that Chinese courts should not decline jurisdiction without legislative authorisation.⁸ However, Chinese judicial practice departs from the tradition and plays a pioneering role in improving Chinese law in this area. This article systematically examines Chinese law and practice in *forum non conveniens*. It shows that

² This is the doctrine of *forum non conveniens*. Britain, Australia, the US, Canada (common law), Quebec, Israel and many other countries have adopted different versions of *forum non conveniens*. For more discussion, see Fawcett (n 1 above), pp 10–27; Ronald A Brand, “Comparative *Forum Non Conveniens* and the Hague Convention on Jurisdiction and Judgments” (2002) 37 *Texas International Law Journal* 467.

³ This is the doctrine of *lis pendens*. See, in general, Campbell McLachlan, *Lis Pendens in International Litigation* (Leiden/Boston, Martinus Nijhoff Publishers, 2009).

⁴ Most countries recognize the effectiveness of a foreign exclusive jurisdiction clause and it is either compulsory or a *prima facie* case for their courts to decline jurisdiction in favour of the chosen court. See Fawcett (n 1 above), pp 47–48. Pursuant to Art II.3 of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards of 1958, a court must decline jurisdiction in favour of a valid arbitration agreement.

⁵ See, in general, Joseph H Beale, “Jurisdiction of a Sovereign State” (1922) 36 *Harvard Law Review* 241.

⁶ Louis F Del Duca and George A Zaphiriou, “Rules for Declining to Exercise Jurisdiction in Civil and Commercial Matters: *Forum Non Conveniens*, *Lis Pendens*” (1994) 42 *American Journal Comparative Law (Supplement)* 245.

⁷ China law provides relevantly broad grounds to allow a court to take extraterritorial jurisdiction. *Zhonghua Renmin Gongheguo Minshi Susong Fa* [PRC Civil Procedure Law] (adopted by the Seventh National People's Congress, 9 April 1991, amended by the Standing Committee of the 10th National People's Congress, 28 October 2007, and by the Standing Committee of the 11th National People's Congress, 31 August 2012), Arts 21, 33, 34, 265 and 266.

⁸ Zhenmin Wang, “The Rome Law Tradition and Its Future Development in China” (2006) 1 *Frontiers of Law* 72, 78.

discretionary power to decline jurisdiction for “convenience” has already been accepted in judicial practice regardless of the absence of legislative support. It is concluded that the judge-driven development has contributed greatly to this area of law, and Chinese courts, especially courts in economically developed areas, are no longer zealously competing with foreign courts in taking civil jurisdiction. They have paid more attention to procedural efficiency and justice, as well as international comity between countries. Further improvement and modernisation require more systematic legislation, more appropriately designed rules and guidance and better training and education for Chinese judges.

2. History of *Forum Non Conveniens* in China<H1>

Forum non conveniens is a common law doctrine that originated in Scotland and later imported by most common law countries in the world.⁹ China, with its civil law tradition, did not accept the similar doctrine in history. This doctrine is not expressly provided in any legislation including the Civil Procedure Law (CPL). Development is mainly led by judicial interpretation and practice. After the promulgation of the CPL in 1991, the Supreme People’s Court (SPC) has taken the issue of “convenience” into consideration and instructed the local courts to refuse jurisdiction in exceptional cases where both parties were not Chinese citizens or companies, and the dispute had no connections with China.¹⁰

In 1998, the Vice President of the SPC, Li Guoguang, pointed out that although Chinese courts “should” exercise jurisdiction granted by law, the court can advise the parties to bring the proceedings in another country if both parties are not Chinese

⁹ For more on this doctrine, see Fawcett (n 1 above), pp 10–21.

¹⁰ In 1993, for example, the SPC instructed the Shenzhen Intermediate People’s Court to refuse jurisdiction to a cross-border dispute on a letter of credit, because none of the parties were Chinese companies and the dispute had no substantive connection with China; in *Dongpeng Trade v HK Bank of East Asia*, Renmin Fayuan Anli Xuan [Selected Cases of People’s Courts] (Renmin Fayuan Chubanshe [People’s Court Publisher], 1996), 143. See also Guangzhou High People’s Court (1995) Yue Fa Jing Er Jian Zi No 3; *Sumitomo Bank v Xinhua*, SPC (1999) Jing Zhong Zi No 194.

residents, and the disputes have no material connections with China and asserting jurisdiction would not lead to difficulty in accessing evidence and enforcing the judgment.¹¹ Following this, the *SPC Notice on Several Notable Matters Concerning Adjudication of Civil and Commercial Cases Involving Foreign Elements and Enforcement*,¹² published in 2000, requires Chinese courts to take jurisdiction if it has jurisdiction granted by law and not to decline jurisdiction without any “reasonable causes”.¹³ It implies the possibility that Chinese courts might exercise discretion to decline jurisdiction with reasonable causes, although no detailed guidance is provided to determine what the reasonable causes are.

The first official document that adopts the terminology of *forum non conveniens* is the *Answers to Questions Arising out of Trial Practice of Commercial and Maritime Cases with Foreign Elements* published by the SPC in 2004.¹⁴ The SPC recognised the fact that although the doctrine of *forum non conveniens* has not been expressly included in the People’s Republic of China CPL, it could be used by the defendant in practice to persuade Chinese courts to decline jurisdiction. Jurisdiction can be declined under *forum non conveniens* where both parties are foreigners, the main fact has no connection with China, it is significantly difficult for the trial court to determine the fact and to apply the governing law and the judgment needs recognition

¹¹ Li Guoguang, *Quanguo Shangshi Shenpan Huiyi de Jianghua* [The Talk in the National Conference on Trial of Economic Cases], published by the SPC on 23 November 1998; Mo Zhang, “International Civil Litigation in China: A Practical Analysis of the Chinese Judicial System” (2009) 25 *Boston College International and Comparative Law Review* 59, 73.

¹² SPC, *Zuigao Renmin Fayuan Guanyu Shenli he Zhixing Shewai Minshangshi Anjian Yingdang Zhuyi de Jige Wenti de Tongzhi* [SPC Notice on Several Notable Matters Concerning Adjudication of Civil and Commercial Cases Involving Foreign Elements and Enforcement] [2000] Fa Fa No 51.

¹³ *Ibid.*, Art 1; Zhang Yi, *Qianxi Fei Fangbian Fayuan Yuanze de Yunyong* [Analysis of the Application of Forum Non Conveniens Doctrine], in Guangzhou High People’s Court, *Zhongguo Shewai Shangshi Shenpan Redian Wenti Tanxi* [Study of Hot Issues in Chinese Foreign-Related Commercial Trial] (Beijing, Falv Chubanshe [Law Publishing], 2004) 73.

¹⁴ A Chinese version is available at <http://www.lawtime.cn/info/maoyi/myzc/20081217111.html>, answer 7 (visited 20 May 2011).

and enforcement in another country.¹⁵ Although the *Answer to Questions Arising Out of Trial Practice of Commercial and Maritime Cases with Foreign Elements* provides the very restrictive conditions, it marks the first important move to provide a notable exception to the traditional understanding that Chinese civil jurisdiction in cross-border disputes is compulsory, and not subject to any discretion.

A more detailed guidance was provided by SPC in 2005 in the *Minutes of the Second Symposium on the Trial of Commercial and Maritime Cases with Foreign Elements (2005 Minutes)*.¹⁶ The *2005 Minutes* provides that jurisdiction could be declined if a court finds taking jurisdiction inconvenient. This power can only be used where: (1) the defendant pleads *forum non conveniens*, or the defendant challenges jurisdiction and the trial court considers *forum non conveniens* applicable; (2) the seized Chinese court has jurisdiction; (3) there is no agreement between the parties choosing Chinese courts; (4) the case is not the one falling within the exclusive jurisdiction of China; (5) the case does not affect the interest of citizens, legal persons or other organisations of China; (6) the primary fact that gives rise to the dispute occurred out of China; (7) there is a foreign court that has jurisdiction and it is more convenient to try this case in that court. It is clear that the guidance provided in the *2005 Minutes* is more sophisticated and detailed than the previous directions. It shows that with the improvement of cross-border civil and commercial practice and adjudication in China, the Chinese courts have developed much more comprehensive understanding of the doctrine of *forum non conveniens* and they are more willing to employ it in practice. By far, the Chinese-style *forum non conveniens* has been established. It is fair to recognise that *forum non conveniens* is a doctrine already accepted in Chinese judicial

¹⁵ *Ibid.*

¹⁶ SPC, *2005 Minutes* [2005] Fa Fa No 6, Art 11.

system, which is clearly approved by the SPC in its judicial guidance and applied by some courts at different levels in practice.

The common view is that all the seven conditions must be satisfied before *forum non conveniens* can be used.¹⁷ Compared with countries with common law tradition, the conditions are restrictive and they largely limit the courts' discretionary power. Within these conditions, only seventh condition permits discretion to be made by the judge. All others are straightforward hard-and-fast rules, with no room left for discretion. This greatly limits the application of *forum non conveniens* in Chinese courts. This result, however, may be laudable from the point of view of practitioners because China has concern and lack of confidence on its judicial performance if too wide discretion is provided, which can be abused by judges who do not have proper training in exercising discretion and may lead to uncertainty in practice.

3. Procedure for the Application of *Forum Non Conveniens*<HI>

There has been consensus that before a Chinese court could use *forum non conveniens* to decline jurisdiction, the court must have jurisdiction to hear the dispute.¹⁸ Without jurisdiction at the first place, a Chinese court should simply refuse the action instead of moving to the stage of declining jurisdiction based on the ground of *forum non conveniens*.¹⁹

In Chinese judicial practice, *forum non conveniens* could be triggered either by the defendant's application²⁰ or by the courts' own motion.²¹ Some commentators argue that if the defendant did not challenge jurisdiction by pleading *forum non conveniens*,

¹⁷ Du Huanfang, "Zhongguo Fayuan Shewai Guanxiaquan Sheizheng Yanjiu" ["An Empirical Study on Cross-Border Jurisdiction in Chinese Courts"] (2007) 2 *Fa Xue Jia* [Jurist] 152, 157.

¹⁸ 2005 Minutes, Art 11.

¹⁹ For example, *Fuoshan Municipality Government v Bank of Communications Hong Kong Branch*, SPC (2005) Min Si Zhong Zi No 11.

²⁰ *Dongpeng Trade v HK Bank of East Asia* (n 10 above); *Kwok and Yih Law Firm v Xiamen Huayang Color Printing Co*, Xiamen Intermediate People's Court, 13 August 2003; *Cai v Wang* Fujian Province Jinjiang Intermediate Court (1997) No 27.

²¹ 2005 Minutes, Art 11; *Kwok and Yih Law Firm v Xiamen Huayang Color Printing Co*; *Sumitomo Bank v Xinhua* (n 20 above).

jurisdiction should be deemed accepted.²² Furthermore, the defendant has to discharge the burden to prove the other forum is more convenient to hear the dispute. The court should not automatically decide whether using *forum non conveniens* is appropriate without evidence provided by defendant.²³ The main purpose of *forum non conveniens* is to balance the litigation power between the parties and to prevent the claimant from subjecting the defendant in an oppressive and vexatious forum. If the defendant does not feel prejudiced by the “inconvenience” of the forum seized by the claimant, the court should not take steps to make the judgment.²⁴

However, others view *forum non conveniens* as a self-supervision mechanism, which prevents the court from excessive and inappropriate exercise of jurisdiction.²⁵ It is also inappropriate to hold that the main purpose of *forum non conveniens* is to protect the defendant. Sound administration of justice should be a more weighty reason to justify the *forum non conveniens* doctrine than the defendant’s interest, which can be counterbalanced by the claimant’s right to sue in many cases.²⁶ Furthermore, when deciding whether or not to decline jurisdiction, a court usually considers factors which concern not only the defendant’s convenience but also the overall efficiency of trial. These factors include the accessibility of evidence and witness, the location of the parties’ assets and the enforceability of judgments.²⁷ A court should have discretion

²² Zhang Yi, *Qianxi Fei Fangbian Fayuan Yuanze de Yunyong* (n 13 above), p 50; Zhang Shudian, “Lun Woguo Bufangbian Fayuan Yuan Shiyong de Ruogan Zhengyi Wenti” [“Study on Problems on Forum Non Conveniens in court”] (2009) 7 *Xingzheng Faxue* [Public Administration and Law] 96, 97.

²³ Zhang Yi (n 22 above), p 50; Zhang Shudian (n 22 above), p 97. If the court voluntarily considers *forum non conveniens* without the defendant’s application, the court does not require any party to discharge the burden of proof. *Sumitomo Bank v Xinhua* (n 10 above).

²⁴ Zhang Shudian, *Lun Woguo Bufangbian Fayuan Yuanze Shiyong de Ruogan Zhengyi Wenti* (n 22 above), pp 96, 97.

²⁵ *Ibid.*, p 97.

²⁶ Huang Qiufeng, “Zhongguo Ying Qiuli Bufangbian Fayuan Zhidu” [“Set Up the Doctrine of *Forum Non Conveniens* in China”] (2010) 28(4) *Hebei Fa Xue* [Hebei Law Science] 70, 73.

²⁷ Li Zhiping and Liu Li, “Bufangbian Fayuan Yuanze Zai Woguo Shiyong de Kexingxing Fenxi” [“Feasibility of Application of the Principle of the *Forum Non Conveniens* in China”] (2008) 24 *Xue Xi Lun Tan* [Tribune of Study] 68, 70. For the public-private balance in *forum non conveniens*, see EJ Derr, “Striking a Better Public-Private Balance in *Forum Non Conveniens*” (2008) 93 *Cornell Law Review* 819.

not to hear a case in order to protect public interest, either with or without the defendant's application.²⁸

It is also suggested by some commentators that distinguished treatment should be given to different situations. If the trial affects national interests and public policy of the country where the court is located, the court should be able to use its own motive to decline jurisdiction.²⁹ This approach is impractical because it increases uncertainty and complexity.

The SPC 2005 *Minutes* suggest that, the *forum non conveniens* defence can be initiated by the defendant or raised by judges, if the defendant challenges jurisdiction on other grounds.³⁰ It seems to aim at achieving a mid-way between two approaches. The SPC also provided judicial direction in 2008 that when a People's Court hears a commercial dispute relating to Hong Kong or Macau, if the defendant does not enter an appearance in court, the People's Court should not use its own motive to decline jurisdiction under *forum non conveniens* without the defendant's application.³¹ The direction only addresses commercial cases with elements relating to Hong Kong or Macau. It is uncertain whether the same interpretation could be applied to non-commercial disputes, such as tort and family. Equally, it is uncertain whether the interpretation can be applied to disputes with elements relating to a foreign country.

4. Factors Considered in Applying *Forum Non Conveniens*<H1>

Pursuant to the SPC 2005 *Minutes* and other courts' judicial practice, when exercising discretion under *forum non conveniens*, Chinese courts should consider all the factors of the case, in particular, the objective nexus between the dispute and a country, the

²⁸ Huang Qiufeng (n 26 above), p 73.

²⁹ Li Zhiping and Liu Li (n 27 above), p 70.

³⁰ 2005 *Minutes*, Art 11.

³¹ SPC, *Zuigao Renmin Fayuan Guanyu Yinfa "Quanguo Fayuan She GangAu Shangshi Shenpan Gongzuo Zuotanhui Jiyao" de Tongzhi* [Notice of the Supreme People's Court on Issuing the Minutes of the Symposium on the Trial of Commercial Cases involving Hong Kong or Macao by Courts Nationwide] [2008] Fa Fa No 8, Art 7.

intention of both parties, purpose of the claimant to seize the trial court, procedure efficiency, convenience and cost, the enforcement of judgments, existence of judicial cooperation with the alternative forum and any impact of the case on China.

a. Objective Nexus, Procedure Efficiency and Cost<H2>

If the main factors that give rise to the action and relate to the dispute are located in another country, that country may be more convenient to hear the dispute. These factors include the domicile of both parties,³² the place of business of the representative of the parties,³³ the cause of action,³⁴ the place where a contract is concluded,³⁵ the subject matter of the dispute,³⁶ and many more.

In *Baron Motorcycles Inc v Awell Logistics Group, Inc*,³⁷ the third party Freedontor Co purchased motorcycles and parts from Baron Motorcycles, which contracted with the defendant carrier to carry the goods from China to Miami. The defendant refused to provide goods to the purchaser upon producing the bill of lading and the consignor sued the carrier for breach of contract. Although the goods were loaded in China, both parties were companies registered in US and the fact that gave rise to the dispute,

³² *Baron Motorcycles Inc v Awell Logistics Group, Inc*, Ningbo Maritime Court (2008) Yong Hai Fa Shang Chu Zi No 277 (both parties were companies registered in US); *Jaten Electronic v Smartech Electronic*, Shanghai No 1 Intermediate People's Court (2009) Hu Yi Zhong Min Wu (Shang) Chu Zi No 51 (both parties were companies registered in Hong Kong); *Cai v Wang* (n 20 above) (both parties had habitual residence/domicile in Hong Kong); *Sumitomo Bank v Xinhua* (n 10 above) (both parties were companies registered in HK). Cf. *Jiangdu Shipyard v CICB Yangzhou Branch and China Bank HK*, Jiangsu Province High Court (2001) Su Jing Chu Zi No 003 (both parties and a third party had their domicile and place of business in Hong Kong).

³³ Cf. *Jaten Electronic v Smartech Electronic* (n 32 above); *Jiangdu Shipyard v CICB Yangzhou Branch and China Bank HK* (n 32 above) (the defendant CICB HK had no representative office or property in China).

³⁴ *Baron Motorcycles Inc v Awell Logistics Group, Inc* (n 32 above) (the consignor sued the carrier for delivery of goods without the bill of lading, which occurred in Miami); *Jaten Electronic v Smartech Electronic* (n 32 above) (the buyer sued for the defective performance of a sale of goods contract on the part of the seller, where the goods were delivered and paid in Hong Kong); *Sumitomo Bank v Xinhua* (the loan contract was performed in HK) (n 10 above).

³⁵ *Jaten Electronic v Smartech Electronic* (n 32 above) (the contract from which the dispute arose was concluded in Hong Kong); Cf. *Jiangdu Shipyard v CICB Yangzhou Branch and China Bank HK* (n 32 above) (the contract that gave rise to the dispute was concluded in HK); *Sumitomo Bank v Xinhua* (n 10 above) (the loan contract was concluded in HK).

³⁶ *Jaten Electronic v Smartech Electronic* (n 32 above); *Jiangdu Shipyard v CICB Yangzhou Branch and China Bank HK* (n 32 above).

³⁷ Ningbo Maritime Court (2008) Yong Hai Fa Shang Chu Zi No 277.

namely the delivery of goods without bill of lading, occurred in Miami. The People's Court considered it more convenient for the Miami court to hear the case. Suing in Miami was convenient for both parties; it is easier to access the witnesses and evidence; the judgment will be recognised and enforced in Miami. Trial in Miami is more efficient and costs less than in China. The Chinese court declined jurisdiction based on *forum non conveniens*.

It is important to note that Chinese jurisprudence does not support the concept of natural forum. Therefore, the closest connection between a dispute and a country does not *prima facie* justify the use of *forum non conveniens* in favour of the centre of gravity. Chinese courts take these factors into consideration because they usually relate to procedural efficiency and convenience of both parties and the court. The common domicile or habitual residence of the parties is the most convenient jurisdiction for both parties to enter into appearance³⁸; the place where the cause of action occurs is the most convenient place to access the witness and evidence³⁹; the country where the subject matter of the dispute is located has the advantage in disposal of the property and enforcement of judgments.⁴⁰ The objective nexus, which are relevant in Chinese *forum non conveniens* exercise, are nexus concerning the convenience, cost and efficiency of trial and should exclude other factors traditionally relevant in determining the proximity between a country and a dispute but having nothing to do with the efficiency of trial procedure, such as the domicile of one party, language and currency used in the transaction, or the domain name of a relevant website.

b. Agreements Choosing Chinese Courts<H2>

³⁸ *Baron Motorcycles Inc v Awell Logistics Group, Inc* (n 32 above); *Jaten Electronic v Smartech Electronic* (n 32 above); *Cai v Wang* (n 20 above).

³⁹ *Baron Motorcycles Inc v Awell Logistics Group, Inc* (n 32 above).

⁴⁰ *Baron Motorcycles Inc v Awell Logistics Group, Inc* (n 32 above); *Jaten Electronic v Smartech Electronic* (n 32 above).

Chinese courts usually would not decline jurisdiction in favour of a more appropriate foreign country if the parties have chosen China as the competent court.⁴¹ Since Chinese courts are chosen, the parties have agreed Chinese jurisdiction appropriate and not to submit their dispute to other jurisdictions. Autonomy of the parties thus excludes the necessity to conduct a normal search for the more convenient/appropriate forum. In practice, many Chinese courts held that they should be satisfied that there were no jurisdiction agreements choosing Chinese courts before considering *forum non conveniens*.⁴²

Interestingly, the strict effect is granted to any jurisdiction clauses choosing Chinese courts, irrespective of whether they are exclusive in nature. In practice, parties may enter into a non-exclusive jurisdiction clause, which selects China as one of the competent courts, without excluding other competent courts their jurisdiction. Chinese judicial practice treats such an agreement compulsory, which prevents Chinese courts from declining jurisdiction under *forum non conveniens*.⁴³

c. Impact in China<H2>

It is suggested in the *2005 Minutes* that Chinese Courts cannot decline jurisdiction if the case might have impact in China.⁴⁴ “Impact in China” may be understood either broadly or narrowly. The broad interpretation suggests that a Chinese court cannot decline jurisdiction if the dispute concerns any China-related interest, including the domicile, habitual residence or nationality of either party or any related third party, the location of any fact giving rise to the action and the location of the subject matter

⁴¹ *2005 Minutes*, Art 11(3).

⁴² In *Baron Motorcycles Inc v Awell Logistics Group, Inc* (n 32 above), the court stated the lack of a jurisdiction clause choosing China was one of the factors supporting the use of *forum non conveniens* to decline jurisdiction. See also *Jaten Electronic v Smartech Electronic* (n 32 above).

⁴³ *2005 Minutes*, Art 11(3) does not distinguish exclusive and non-exclusive jurisdiction clauses. It is suggested that even if a non-exclusive jurisdiction clause has no intention to exclude jurisdiction of other competent forum, since the parties have, by agreement, submitted to Chinese courts, they have admitted that the trial in Chinese courts should be convenient, which excludes the consideration of *forum non conveniens*.

⁴⁴ *2005 Minutes*, Art 11(3).

or property belonged to either party. The broad interpretation prevents Chinese courts from declining jurisdiction in cases where the claimant arbitrarily establishes connections to bring the action in China. This usually happens when Chinese courts have no jurisdiction over the dispute against the foreign defendant, but the claimant pursues a factitious claim against a related Chinese party as the anchor defendant and sues both parties in China. In *Jiangdu Shipyard v CICB Yangzhou Branch and China Bank HK*,⁴⁵ the China Bank HK, upon the application of a Hong Kong company, issued a letter of credit for the benefit of the claimant. Disputes arose as to the issuing bank's obligation under the letter of credit. Since the China Bank HK had no connection with China, the claimant sued the CICB Yangzhou as the co-defendant. Pursuant to Art 22 of the CPL 1991 (Art 21 of the CPL 2012), the domicile of one defendant has jurisdiction against the co-defendant. The only role CICB Yangzhou played in this dispute was receiving and passing relevant application documents submitted by the claimant to the China Bank HK. This role had no substantive effects on the disputes or the transaction and only functioned to speed up the process of application for the letter of credit.

The China Bank HK applied declining jurisdiction based on *forum non conveniens*. The subject matter of the claim was located in Hong Kong, the defendant China Bank HK had no representative office or property in China, the applicant, issuing bank and the place where the bill of exchange should be accepted and paid were all located in Hong Kong and the contract was concluded and performed in Hong Kong. The real defendant was China Bank HK, and the Chinese defendant, CICB Yangzhou, had no real obligation in the performance letter of credit. The only reason for the claimant to

⁴⁵ Jiangsu Province High People's Court (2001) Su Jing Chu Zi No 003.

sue CICB Yangzhou was to avoid Hong Kong jurisdiction and to create an artificial nexus to bring the action in China.

The court, however, refused to decline jurisdiction based on the ground that the dispute had impact on China. The claimant was a Chinese company and one of the defendants was a Chinese company.⁴⁶ It was held that the involvement of the Chinese parties created necessary impact in China. This decision, however, is controversial. The purpose to include CICB Yangzhou as the co-defendant is to establish an artificial ground for the Chinese court to take jurisdiction. The objective of *forum non conveniens* is to prevent jurisdiction from being exercised in this circumstance. Furthermore, if “impact” can be established in all cases including any non-substantive, superficial, Chinese elements, almost all cases brought to Chinese courts would satisfy this condition.⁴⁷

The narrow interpretation of “impact in China” only covers significant impact in China as a whole. Any impact in a related transaction would not prevent the court from declining jurisdiction. In *Jaten Electronic v Smartech Electronic*,⁴⁸ for example, two Hong Kong companies entered into a contract for the sale of electronic products. The contract from which the dispute arose was concluded in Hong Kong, the goods were delivered and paid in Hong Kong, the goods were currently stored in Hong Kong, and there was no agreement choosing Chinese courts. The final purchaser of

⁴⁶ See comments in Du Huanfang (n 17 above), p 157.

⁴⁷ CPL requires certain connections with China in order to establish jurisdiction. See Art 265 of CPL. See also *Castel Freres SAS v Li and Xu*, Zhejiang Province High People’s Court (2011) Zhe Xia Zhong Zi No 9 (the claimant sued multiple defendants for the infringement of trademark in Zhejiang. The court accepted jurisdiction over all the defendants, including defendants that had their domicile out of Zhejiang, based on the fact that one defendant was a Zhejiang domiciliary, according to Art 7 of the Interpretation of Several Questions on the Application of Law in Trial of Trademark Civil Dispute Cases, which provides that “[i]n instances of litigation involving several defendants situated in different locations, the plaintiff can choose a court which has jurisdiction over any one of the defendants to hear the case”. Castel Freres pleaded *forum non conveniens* based on the fact that two other defendants and one plaintiff had their domicile in Shanghai. Zhejiang court, however, took jurisdiction based on the fact that one defendant had domicile in the province).

⁴⁸ Shanghai No 1 Intermediate People’s Court (2009) Hu Yi Zhong Min Wu (Shang) Chu Zi No 51.

the goods was in Shenzhen, which was known by both parties. Although the final purchaser was not a contractual party of the current sales contract, it was involved in the negotiation on the quality and requirements for the goods.⁴⁹ It is clear that Hong Kong was the most convenient forum to hear the dispute. However, since the final purchaser of the disputed subject matter was located in China, would the court refuse to decline jurisdiction on the ground that the case has impact in China? If a broad interpretation is adopted, the court should take jurisdiction because the result may affect a related third party in China. The Shanghai Intermediate People's Court, however, adopted a narrow interpretation by holding that the domicile of the final purchaser only concerned the buyer's resale of the goods, which had nothing to do with the dispute in question. The current case only concerned the parties' rights and obligations arising out of the sales contract and did not have direct legal effect to a related resale contract. As a result, there was no impact in China and the court declined jurisdiction. The narrow interpretation is more appropriate in determining when jurisdiction should be declined.

d. Applicable Law<H2>

The application of foreign law as the governing law to the dispute is also a relevant factor. Under Chinese law, if the parties have chosen the applicable law, the parties should be responsible to prove the foreign law⁵⁰; in the absence of choice, Chinese courts could demand the party that proposes the application of foreign law to prove the relevant foreign law, or the party could apply for the court to prove the foreign

⁴⁹ The defendant has a representative branch in Shanghai and the contract offer was faxed from the Shanghai branch. According to Art 241 of the CPL 2007, Shanghai courts have jurisdiction. The issue is whether Shanghai courts should decline jurisdiction in favour of Hong Kong.

⁵⁰ Law of the Application of Law for Foreign-related Civil Relations of China, Art 10; SPC, *Zuigao Renmin Fayuan Guanyu Shenli Shewai Minshi huo Shangshi Hetong Jiu fen Anjian Falv Shiyong Ruogan Wenti de Guiding* [Rules of the Supreme People's Court on the Relevant Issues Concerning the Application of Law in Hearing Foreign-Related Contractual Dispute Cases in Civil and Commercial Matters] (2007 Rules") [2007] Fa Shi No 14, Art 9.

law.⁵¹ In the latter circumstances, the court can acquire the information on the content and interpretation of the foreign law through the central organ of a contractual state that has entered into judicial assistance treaties with China, Chinese embassy or consulate in the foreign country, the embassy of the foreign country in China or Chinese and foreign legal experts.⁵² In practice, the court or the party usually requires foreign law firms to provide opinions, which will be checked and approved by Chinese courts. If disputes on the content and interpretation of foreign law arise, the court will adopt strict standards to prove foreign law.⁵³ Some judges require five steps to be followed for a court to admit the proof of foreign law: (1) the evidence or opinion provided by the foreign law firm should be notarised in the foreign country, (2) the authentic instrument should be certified by the Chinese embassy in the foreign country, (3) the notarised evidence is translated by the authorised translation organ, (4) the translation should be notarised for its authenticity and (5) the versions of both language are submitted to the Chinese courts.⁵⁴ Obviously, the procedure is complicated and demands time, money, recourses and extra administrative work. As a result, most Chinese courts accept that the application of foreign law should be one factor considered in *foreign non conveniens*.⁵⁵

⁵¹ Law of the Application of Law for Foreign-related Civil Relations of China, Art 10; SPC, *Zuigao Fayuan Guanyu Jiangmenshi Hua'ErRen Boli Youxian Zeren Gongsi Su Stein Heurtey, Shanghai Stein Heurtey Gongyelu Youxian Gongsi Chanpin Zeren Jiufen'an Youguan Zhongcai Tiaokuan Xiaoli de Qingshi de Fuhan* [Response to the Application on the Validity of Arbitration Clauses in the Product Liability Dispute between Jiangmen Hua'ErRen Glass Ltd Co and Stein Heurtey, Shanghai Stein Heurtey Mecc Industrail Furnance] [2006] Min Si Ta Zi No 9.

⁵² SPC, *Zuigao Renmin Fayuan Guanyu Guanche Zhixing "Zhonghua Renmin Gongheguo Minfa Tongze" Ruogan Wenti de Yijian* [SPC Opinions on Several Issues Concerning the Implementation of the General Principles of the Civil Law of China (Trial Implementation)] (26 January 1988), available at www.chinalawinfo.com.

⁵³ SPC, 2007 Rules, Art 10; Liu Laiping, "Zhongguo Waiguofa Chaming de Sifa Shijian ji Lifa Jianyi" ["China's Judicial Practice and Legislative Suggestions on Proof of Foreign Law"] (2006) 173 *Shou Du Shi Fan Da Xue Xue Bao (She Hui Ke Xue Ban)* [Journal of Capital Normal University (Social Science Edition)] 37(2006), 38.

⁵⁴ Liu Laiping (n 53 above), p 38.

⁵⁵ *Baron Motorcycles Inc v Awell Logistics Group, Inc* (n 32 above) (US law was the possible applicable law); *Jaten Electronic v Smartech Electronic* (n 32 above) (HK law would apply under Chinese choice of law rules, continuing jurisdiction could cause difficult); *Sumitomo Bank v Xinhua* (n

e. Related Criminal Actions Tried Abroad<H2>

Chinese courts also decline jurisdiction if there is a criminal action in relation to the current civil or commercial dispute and the criminal action can only be tried abroad. In *Cai v Wang*,⁵⁶ for example, the husband brought an action for divorce in the Chinese court of the place of registration of their marriage.⁵⁷ The spouse had their habitual residents in Hong Kong, family assets were primarily located in Hong Kong and two children had habitual residents in Hong Kong. Before the husband brought the action in China, the wife had already brought the divorce action in Hong Kong which was accepted by the Hong Kong courts. Besides, the wife also sued in Hong Kong for alleged bigamy committed by the husband, which was a criminal offence. Since the divorce action and the criminal proceedings on bigamy were closely connected, and only Hong Kong had jurisdiction for the latter, the Chinese court declined jurisdiction on the ground that it would be more convenient and practical to have Hong Kong court to hear both proceedings.

f. Concurrent Proceedings/*Lis Pendens*<H2>

The existence of concurrent proceedings is not an important consideration in China. In practice, Chinese courts have rarely, if not never, considered the fact that the same action between the same parties is pending in the court of another country. Because Chinese jurisprudence views jurisdiction an expression of state sovereignty, China does not accept seizing another country first or alongside the Chinese proceedings has any effects on Chinese jurisdiction. China also admits that every sovereign state has

10 above) (parties chose HK law to govern the loan agreement). See comments in Xi Xiaoming, “*Bufangbian Fayuan Zhidu de Jidian Sikao*” [“Some Thoughts on *Forum Non Conveniens*”] (2002) 49(1) *FaXue YanJiu* [Chinese Journal of Law] 81, 90.

⁵⁶ Fujian Province Jinjiang Intermediate People’s Court (1997) Quan Min Gao Zi No 27.

⁵⁷ SPC, *Zuigao Renmin Fayuan Guanyu Yuan Zai Neidi Dengji Jiehun, Xian Shuangfang Jun Juzhu Xianggang, Fasheng Lihun Susong Shifou Ke’an* “*Guanyu Zhuwai Shilingguan Chuli Huaqiao Hunyin Wenti de Ruogan Guiding*” de Tongzhi Banli de Pifu [Response to the Question on Whether the People’s Court in Mainland China Could Hear the Divorce Action between Spouses Married in China and Both Resided in Hong Kong after Marriage] [1984] Fa Min Zi No 3.

power to decide jurisdiction and this inevitably would result in more than one competent jurisdiction over the same cause of action. Chinese courts would not decline jurisdiction simply because the case has already been brought in another country or because a foreign court has already given judgments on the same subject matter.⁵⁸ In the SPC's *Opinion on the Implementation of the Civil Procedure Law*, it clearly states that⁵⁹

<Block quote>[i]f both Chinese Courts and foreign courts have jurisdiction, one party sued in foreign courts and the other party subsequently sued in the People's court, the People's court could take jurisdiction. If the foreign court or the party applies for the recognition and enforcement of judgment given by the foreign court, the application should be refused, unless treaties acceded or ratified by both countries provide otherwise.</Block quote>

However, the SPC also accepts that the Chinese court is not obliged to exercise jurisdiction if a foreign court has seized or exercise jurisdiction. Chinese courts could exercise discretion but *lis pendens* is not a weighty factor in consideration.⁶⁰

However, different opinions have been given by senior members of the SPC for *lis pendens* between China and Hong Kong, Macau or Taiwan. The then Chairman of No 1 Civil Tribunal of the SPC, DU Wanhua, suggests that in terms of interregional conflicts of jurisdiction between China on one hand and Hong Kong, Macau or

⁵⁸ *Kwok and Yih Law Firm v Xiamen Huayang Color Printing Co* (n 20 above). The member of the Judicial Committee of the SPC, the Chairman of No 1 Civil Tribunal, Du Wanhua, suggests that if both Chinese courts and foreign courts have jurisdiction, one party brings proceedings in the Chinese court after the other commences proceedings in the competent foreign court, the Chinese court should take jurisdiction in normal circumstances. See Du Wanhua, *Jiaqiang Jiandu Zhidao, Cujin Sifa Hexie, Nuli Tuidong Minshi Shenpan Gongzuo Xin Fazhan—Zai Chengdu, Shantou Zhaokai de Minshi Shenpan Zhuanti Zuotanhui Shang de Jianghua* [Strengthen Supervision and Guide, Promote Judicial Harmony, Improve the Development of civil Trial – the Talk in the Symposium on Civil Trial in Chengdu and Shantou] (2007), a Chinese version is available in www.chinalawinfo.cn, reference code: CLT.3.110448.

⁵⁹ SPC, 1992 *Opinion*, Art 306. *Shanghai Saifeng International Trade v CICB Changzhou*, Jiangsu Province Changzhou Intermediate People's Court (2006) No 26; *Jiangmen Xinhua Paper Mill v HK Tak Lee Metals and Paper*, Guangdong High People's Court (1999) No 322.

⁶⁰ SPC, 2005 *Minutes* [2005] Fa Fa No 26, Art 10.

Taiwan on the other, Chinese courts could refuse to exercise jurisdiction in favour of the court in Hong Kong, Macau or Taiwan if the same proceedings have already commenced in that jurisdiction.⁶¹ Providing different treatment to concurrent proceedings between China and other Sovereignty States and between different legal regions in China may be justified in terms of different mutual trust, political needs and judicial cooperation that exists for internal and external conflicts of jurisdiction. However, it is suggested by the then Vice President of the SPC, WAN E-xiang, in the same year, that where both China and Hong Kong/Macau have jurisdiction, and one party has sued in Hong Kong or Macau, Chinese courts should take jurisdiction if one of the parties subsequently brought the same action in China.⁶² Both views were presented in different national symposiums; they are not official judicial interpretation and have no legal effects. The situation for Chinese courts to deal with concurrent jurisdiction between China and Hong Kong, Macau or Taiwan is thus uncertain.

g. Enforcement of Judgments<H2>

The possibility of enforcing judgments is a significant factor. In some cases, it is the only consideration that matters and it overrides other factors, such as the closest connection, applicable law, parties' entry into appearance and accessibility of witnesses and evidence. In *Kwok and Yih Law Firm v Xiamen Huayang Color Printing Co*,⁶³ for example, the Xiamen Intermediate People's Court refused to decline jurisdiction regardless of the fact that Hong Kong clearly had the closest connection to the case, that Hong Kong Law applied and that evidence was more easily accessed in Hong Kong. The claimant, a Hong Kong law firm, acted as the

⁶¹ Du Wanhua (n 58 above).

⁶² Wan E'Xiang, *Zuigao Renmin Fayuan Fu Yuanzhang Wan E'Xiang Zai Quanguo She GangAo Shangshi Shenpan Gongzuo Zuotanhui Shang de Jianghua* [The Talk of the Vice President of the Supreme People's Court Wan E'Xiang in the Symposium on Trial Concerning Hong Kong and Macau Related Commercial Matters], published on 22 November 2007.

⁶³ Xiamen Intermediate People's Court, 13 August 2003.

defendant's agency to help the defendant company to be listed in the Hong Kong Stock Exchange. The defendant refused to pay for the services because the application failed. The defendant claimed that the claimant, during the application, had committed fraud by producing fraudulent documents in Hong Kong; the case had big impact in Hong Kong and the claimant probably had committed criminal offences in Hong Kong. The contract included a clause choosing Hong Kong law as the governing law. There was also a valid non-exclusive jurisdiction clause choosing Hong Kong, and the same action was pending in Hong Kong court pursuant to the jurisdiction clause.

The defendant provided multiple reasons. Comparatively, the claimant provided only one argument justifying bringing the dispute in China. The sole argument was that the defendant had no residence, domicile or property in Hong Kong; therefore, the judgment given by the Hong Kong court could hardly be enforced. At the time of the action, there was no judicial cooperation between Hong Kong and China facilitating recognition and enforcement of judgments and Hong Kong judgments can only be enforced in China based on the doctrine of reciprocity.⁶⁴ The Xiamen Intermediate People's Court held that a judgment only had value if it was enforced and, as a result, the reason of enforcement of judgments should override all other factors in favour of Hong Kong courts. The court, thus, refused to decline jurisdiction solely for the purpose of enforcement of judgments.

h. Legal Aid, Fair Trial and Judicial Independence<H2>

It is necessary to point out that the Chinese style of *forum non conveniens* is primarily used to facilitate procedure efficiency. Chinese courts do not intend to consider

⁶⁴ Juridical cooperation between China and Hong Kong was established by the *Mainland-HK Arrangement*. See *Zuigao Renmin Fayuan Guanyu Neidi yu Xianggang Tebie Xingzhengqu Fayuan Xianghu Renke he Zhixing Dangshiren Xieyi Guanxia de Minshangshi Anjian Panjue de Anpai* [Arrangement on Reciprocal Recognition and Enforcement of Judgments in Civil and Commercial Matters by the Courts of the Mainland and of the Hong Kong SAR Pursuant to Choice of Court Agreements between Parties Concerned] (adopted in the 1390th Meeting of the SPC Trial Committee on 12 June 2006; effective on 1 August 2008) [2008] Fa Shi No 9.

substantive justice by comparing judicial practice in the alternative forum. When exercising discretion under *forum non conveniens*, the court will not consider whether the claimant may be prejudiced in the alternative forum because of the lack of legal aid,⁶⁵ whether the fair trial for either party is possible due to political, racial and religious reasons, whether justice cannot be done in a foreign country because its judicial system is underdeveloped or not independent, whether the foreign country will apply a law which might be unjust or offensive and whether the final decision of a foreign court might violate fundamental policy of China.⁶⁶ Chinese courts believe it is inappropriate to judge the judicial system of another country and compare it with China. As far as the case has no impact in China or has no effect on any Chinese citizens or companies, Chinese courts strictly follow the principle of non-interference in other country's internal affairs.⁶⁷ *Forum non conveniens* in China, as a result, only has the purpose of achieving procedural efficiency instead of the ends of justice.⁶⁸

i. Conclusion<H2>

Chinese style *forum non conveniens* is similar with *forum non conveniens* in common law countries in that it grants the court the final discretion to decline jurisdiction and requires the court to consider the “appropriateness” and “convenience” of the trial. However, there are a few special characteristics of Chinese *forum non conveniens*. First, the difficulty for a Chinese court to enforce a foreign judgment and the lack of wide judicial cooperation between China and most countries in the world makes the convenience to enforce judgment weigh heavily in China. Chinese courts usually will not decline jurisdiction if the defendant has assets in China and nowhere else. The

⁶⁵ E Rosalind, “Forum Non Conveniens—the Legal Aid Factor” (1996) 55 *Cambridge Law Journal* 214, 214; FE Jernigan, “Forum Non Conveniens: Whose Convenience and Justice?” (2008) 86 *Texas Law Review* 1079.

⁶⁶ 2005 *Minutes*, Art 11.

⁶⁷ See Yu Minyou and Zhang Shaoyu, “Guoji Faxue Yanjiu Shuping” [“Comments on Research of International Law”] (2000) 47(1) *FaXue YanJiu* [*Chinese J. of L.*] 15.

⁶⁸ For criticism, see Xi Xiaoming (n 55 above), p 89.

Chinese court may hear a case regardless of practical difficulty to access witnesses or evidence or to allow all parties to enter into appearance only for the purpose of enforcing judgments. It may also cause difficulty where the parties have assets located in different countries while the defendant brings a counterclaim. This can only be improved, however, if the Chinese law on recognition and enforcement of judgment is modernised. Second, Chinese courts do not try to prevent concurrent proceedings which may cause inconvenience, extra litigation costs and irreconcilable judgments. Third, there is no consideration given to foreign exclusive jurisdiction clause, the status of which is uncertain. Fourth, there is no consideration given to the ends of justice in individual cases. Chinese style *forum non conveniens*, as a result, presents a few weaknesses.

5. *Forum non conveniens* – Compatibility with Chinese Jurisdiction System and Jurisprudence?<H1>

Regardless of the judicial practice and development in the past 20 years, concerns continue to exist as to the compatibility of the discretion-based doctrine in Chinese judicial system. Some commentators hold a strong view that Chinese judicial system follows the civil law tradition and is incompatible with the discretion-based *forum non conveniens* doctrine.⁶⁹ Supporters, on the other hand, believe that the traditional diversity between civil and common law is no longer a barrier and other countries with civil law tradition, such as Japan, Quebec and Sweden, have already adopted *forum non conveniens* in their domestic courts.⁷⁰ In general, debates focus on three issues.

a. Jurisdiction Bases<H2>

⁶⁹ Li Zhiping and Liu Li (n 27 above), p 69.

⁷⁰ See Fawcett (n 1 above), pp 16–19.

The doctrine of *forum non conveniens* was originated from and widely adopted in common law countries, which adopt discretion-based jurisdiction rules. These rules are based on general principles, which may be broad to make a large number of cases fall into their scope.⁷¹ In England, for example, personal jurisdiction can be exercised upon service of a claim form within jurisdiction,⁷² which could subject many defendants who have only contentious connections with England to English courts.⁷³ In US, courts could exercise long-arm jurisdiction over non-resident defendants who have “minimum” contact with the country.⁷⁴ The exorbitant grounds call for a mechanism that permits the court to decline cases which are inappropriate to be tried in the forum.⁷⁵ The positive jurisdiction confirms a state’s power in principle to regulate any issues with minimum connections with this country, and the discretionary decline of jurisdiction demonstrates a gesture to give up exercising the power in order to promote international comity and to achieve the ends of justice.

Civil law jurisdiction rules, on the other hand, is based on hard-and-fast connecting factors, which are clearly, specifically and precisely established. The legislators aim to establish rules of jurisdiction in a reasonable and balanced manner, to provide comprehensive rules to cover all types of cases and to avoid excessive jurisdiction.⁷⁶

The legislators usually will not grant jurisdiction over claims that have no sufficient

⁷¹ *Ibid.*, p 19; Xu Gongwei, “WoGuo BuYi CaiYong Bu FangBian FaYuan YuanZe” [“On the Impropriety of Adopting the Doctrine of *Forum Non Conveniens*”] (2006) 135 *Fa Xue Ping Lun* [Law Review] 146, 146–148.

⁷² CPR, r 6.9; CMV Clarkson and Jonathan Hill, *The Conflict of Laws* (Oxford, Oxford University Press, 4th ed., 2011) 103–104; JJ Fawcett and J Carruthers, *Cheshire, North and Fawcett: Private International Law* (Oxford, Oxford University Press, 14th ed., 2008) 354–374.

⁷³ Clarkson and Hill (n 72 above), pp 104–105.

⁷⁴ Jurisdiction was expanded greatly after *International Shoe Co v Washington*, 326 US 310 (1945). *Forum non conveniens* was systematically recognized and used after this case. See *Gulf Oil Corp v Gilbert*, 330 US 501 (1947). Allan R Stein, “*Forum Non Conveniens* and the Redundancy of Court-Access Doctrine (1958) 133 *University of Pennsylvania Law Review* 781, 802.

⁷⁵ Stein (n 74 above), p 802.

⁷⁶ For example, the Brussels I Regulation in EU; Fawcett (n 1 above), p 19.

connections with the country. The functioning of the court is to strictly apply the statutory provisions without discretion not to exercise jurisdiction granted by law.

China follows civil law tradition. Jurisdictional grounds are clearly established in legislation. Jurisdiction is not based on flexible principles which require a court to exercise discretion to consider whether taking jurisdiction is “reasonable”. However, it does not mean that Chinese jurisdiction is unlikely to be taken in an unreasonable and excessive manner. It is necessary to recognise that China bases its international jurisdiction on state sovereignty and Chinese legislation has the tradition to expand its jurisdictional power versus other countries. Jurisdiction grounds in China are very broad.⁷⁷ Chinese courts have jurisdiction in cross-border disputes if China is the place where the contract is signed, the contract is performed, the object of the action is located, the defendant’s distrainable property is located, the tort is committed, the defendant’s representative office is located,⁷⁸ the parties have chosen to resolve their disputes,⁷⁹ the defendant has his habitual residence or domicile⁸⁰ or any one of the co-defendants has his habitual residence or domicile.⁸¹ Any of the above elements located in China could grant Chinese court jurisdiction over cross-border disputes,⁸² even if China may have no practical connections to the disputes in question or the final result of the case.⁸³ Although being a civil law country, personal jurisdiction in China is not narrower than that in many common law countries.⁸⁴

⁷⁷ It is commented that China adopts “long-arm” jurisdiction in cross-border civil and commercial cases. See Xi Xiaoming (n 55 above), p 81.

⁷⁸ CPL, Art 241.

⁷⁹ *Ibid.*, Art 242.

⁸⁰ *Ibid.*, Art 22.

⁸¹ *Ibid.*, Art 22.

⁸² Xu Gongwei (n 71 above), p 146.

⁸³ For example, the contract is signed in China between two foreign companies and performed abroad and neither company has disposable assets in China. The defendant has a representative office in China, which has no connection with the dispute in question. The defendant has habitual residence in China, but this dispute has nothing to do with China.

⁸⁴ *Cf.* service out of jurisdiction in England, CPR, Pt 6, Practice Direction 6B, para 3.1(6) and 3.1(7). In Quebec, for example, jurisdiction bases may be wide in cases. Japan also has rather flexible jurisdiction

Rule-based jurisdiction can also be broad depending on the policy for legislation.⁸⁵ The real reason that a civil law country is reluctant to adopt *forum non conveniens* is not because civil law jurisdiction rules are perfectly designed but because civil law tradition is uncomfortable to provide judges “semi-legislative” power.⁸⁶ However, in modern days, civil law and common law are no longer irreconcilable. There is tendency for two systems to learn each other’s experience and transplant it in a different legal soil. *Forum non conveniens* is no longer exclusive for common law countries. The Quebec Civil Code of 1994 expressly permits the Quebec courts to decline jurisdiction if they are satisfied that there is another forum which is more appropriate to decide the dispute in question.⁸⁷ In Japan, the courts reserve discretion to decide the final exercise of jurisdiction by considering “special circumstances” of a case.⁸⁸

b. Weakness of *Forum Non Conveniens*<H2>

Opponents also suggest that China should not adopt *forum non conveniens* because of inherent weakness of this doctrine. First, Chinese law has the objective to achieve certainty, uniformity and predictability,⁸⁹ but the discretion-based *forum non conveniens* doctrine would inevitably cause uncertainty and inconsistent results. Second, the application of *forum non conveniens* would cause extra cost and delay.⁹⁰

grounds based on equity. This justifies adopting *forum non conveniens* in Quebec and Japan. Fawcett (n 1 above), p 19.

⁸⁵ Civil law legislation provides excessive jurisdictional grounds that also exist in other civil law countries. For example, the French national law grants jurisdiction to French courts if any contractual party is French (French Civil Code, Art 14, 15); in Germany, the court could take jurisdiction if the defendant has property in Germany, even if the property may have no connection to the dispute (German Civil Procedure Law, Art 23). See Yuan Quan, “Bu Fangbian Fayuan Yuanze San Ti” [“Three Issues Concerning *Forum Non Conveniens*”] (2003) 16 *ZhongGuo FaXue* [*Chinese Legal Science*] 140, 144.

⁸⁶ P Schlosser, “*Jurisdiction and International Judicial and Administrative Co-operation*”, (2000) 284 *Recueil des Cours* 9, p 25.

⁸⁷ Quebec Civil Code of 1994, Art 3135.

⁸⁸ See Fawcett (n 1 above), p 207.

⁸⁹ Li Zhiping and Liu Li (n 27 above), p 69; Xu Goingwei (n 71 above), p 150.

⁹⁰ Xu Gongwei (n 71 above), p 150.

Third, *forum non conveniens* may be abused by the defendant as a strategy to frustrate the claimant.⁹¹

The above weakness, however, may not exist in the Chinese-style *forum non conveniens*. Pursuant to the SPC judicial direction,⁹² Chinese *forum non conveniens* is used in very exceptional circumstances where the appropriate forum is clearly another country and where giving up jurisdiction could undoubtedly facilitate sound administration of justice and procedural efficiency. Chinese courts are using *forum non conveniens* with caution and will not intend to consider its application in a contentious case. Furthermore, procedural efficiency is the main factor considered in Chinese courts when applying *forum non conveniens*. The Chinese courts will decline jurisdiction if it is much easier and less expensive for the parties to sue in another country. Compared to the litigation cost, the cost and time used in *forum non conveniens* petition is very low.

c. Competent Judges<H2>

Opponents are sceptical about the competence of Chinese judges.⁹³ *Forum non conveniens* requires the exercise of discretion, which can only be used appropriately by competent judges who are familiar with the doctrine and are trained to exercise discretion. The overall quality of Chinese judges, in terms of legal knowledge, practical experience, analysis skills and professional ethics, is in doubt.⁹⁴ However, it is necessary to recognise the improvement of both academic competence and professional skills of Chinese judges in the past decades.⁹⁵ Judicial decisions in cases

⁹¹ *Ibid.*, pp 150–151.

⁹² SPC, 2005 Minutes, Art 11.

⁹³ Xu Gongwei (n 71 above), p 166; Huang Qiufeng (n 26 above), p 71.

⁹⁴ Xu Gongwei (n 71 above); Huang Qiufeng (n 26 above), p 71.

⁹⁵ Xu Qianfei, “Zhongguo Faguan Suzhi Pingxi” [“Evaluation of Quality of Chinese Judges”] (2001) 2(9) *Ren Min Si Fa* [People’s Judicature] 8; XU Qianfei, “Zai Lun Zhongguo Faguan de Suzhi” [“Restatement on Quality of Chinese Judges”] (2004) 4(1) *Ren Min Si Fa* [People’s Judicature] 33; Yang Yulan, “Qiantan Faguan Zhiye Suzhi de Tigao” [“Comments on the Improvement of Competence of Judges”] (2005) 5(10) *Ren Min Si Fa* [People’s Judicature] 33.

where *forum non conveniens* is applied demonstrate the gradual improvement of the quality of judgments. In the first case where *forum non conveniens* is used, the Chinese court declined jurisdiction based more on political consideration instead of legal principles.⁹⁶ In cases determined in 1990s, Chinese judges started to consider procedural convenience and efficiency by analysing the connection between the dispute and two alternative fora.⁹⁷ In decisions made in 2000s, some Chinese judges have provided detailed reasoning and justification based on well-defined criteria.⁹⁸ These cases demonstrate gradual clarification of legal criteria and improved understanding of the discretionary decline of jurisdiction.

China is a country with rule-based tradition, with very different legal culture from discretion-based systems.⁹⁹ However, it does not mean Chinese judges are not competent to apply *forum non conveniens* properly. Applying discretionary doctrines in civil law countries requires clearly designed criteria and guidance so that judges could properly put the designated criteria into practice.

6. Conclusion<H1>

⁹⁶ The first case is *Disputes in Property of Zhao*. In this case, the Chinese plaintiff claimed ownership of property located in Japan. Although the plaintiff had her domicile and habitual residence in China, and some important evidence and witnesses were located in China, the Chinese court did not take jurisdiction because it was recognized that Japan was the more appropriate and convenient forum to hear the case given the fact it was the place where the property and the defendant were located. See Ling Feng, “Laojuanzong zhi Zhaobiyan Yiliu Dongjin Caichan An” [“Tokyo Case – Property Disputes of Zhao Mi Yan”] (2011) 1 *Zhongguo Lvshi* [China Lawyer] 98.

⁹⁷ For example, *Dongpeng Trade v HK Bank of East Asia* (n 10 above); *Sumitomo Bank v Xinhua* (n 10 above); *Cai v Wang* (n 20 above). Feng Xia commented that many Chinese courts decline jurisdiction in favour of another court because of political consideration in 2009 *Zhongguo Guoji Sifa Nianhui* [Chinese Private International Law Annual Conference], see summary by Guo Yujun and Ju Yin “Yantao Shewai Minshi Guanxi Falv Shiyongfa Tuijin Guojisifa Lilun Yanjiu yu Shijian” [“Discussing the Applicable Law on Foreign-Related Civil Relation and Improving Private International Law Theoretical Research and Practice”] (2010) 63 *Wuhan Daxue Xuebao (Zhhexue Shehui Kexue Ban)* [Wuhan University Journal (Philosophy and Social Sciences)] 316, 319–320. This view is incorrect. If one studies the published judgments made after 1990s where the people’s courts declined jurisdiction by using *forum non conveniens*, these courts mainly considered the efficiency and convenience to conduct trial and the possibility to enforce judgments, instead of state sovereignty.

⁹⁸ For example, *Kwok and Yih Law Firm v Xiamen Huayang Color Printing Co* (n 20 above); *Baron Motorcycles Inc v Awell Logistics Group, Inc* (n 32 above); *Jaten Electronic v Smartech Electronic* (n 32 above); and *Jiangdu Shipyard v CICB Yangzhou Branch and China Bank HK* (n 32 above).

⁹⁹ Li Zhiping and Liu Li (n 27 above), p 69.

Forum non conveniens has already been adopted in China and it not only could but also should be accepted in China. Besides the efforts of SPC and other Chinese courts, academics and jurists have also attempted to include *forum non conveniens* in Chinese legislation. The Chinese Society of Private International Law drafted the Model Law of Private International Law, Art 51 of which provides the doctrine of *forum non conveniens*.¹⁰⁰ The proposal for the amendment of CPL (the Third Draft) also suggests the adoption of this doctrine.¹⁰¹ Although neither of these proposals is adopted in the amended CPL, they clearly demonstrate support for the relevant law reform in the future.

The Chinese version of *forum non conveniens* need not follow one or more of the existing models in other countries.¹⁰² Chinese *forum non conveniens* should be an integrated part compatible with Chinese legal system and tailored in a way to be implemented in the current jurisdiction rules. Chinese law is very restrictive on the recognition and enforcement of foreign judgments which prevents judgments from many countries that do not have judicial cooperation treaties or relevant reciprocal relationship with China from being recognised and enforced; it is necessary to permit the Chinese courts to take the issue of recognition and enforcement into consideration. Therefore, the location of the defendant's property in China would be a weighty factor for refusing *forum non conveniens* in China. Although not ideal, it can only be changed upon the reform of law concerning recognition and enforcement of foreign

¹⁰⁰ If a Chinese court has jurisdiction, but the court is satisfied that exercising jurisdiction is very inconvenient to both parties and the trial of cases, and there is another court available which is more convenient to hear the case, the court could decide not to exercise jurisdiction upon the defendant's application. When deciding whether the court should exercise discretion to decline jurisdiction under *forum non conveniens*, the court should consider the elements as follows, such as the convenience and availability of the witnesses, the third parties and multi-defendants, public policy, work loads of the court, expenses and delay. These elements are non-exhaustive and the weight given to each of them varies from case to case. The court should consider all the circumstances of the case to make decision.

¹⁰¹ CPL, Art 495.

¹⁰² For the comparative study and a brief summary of *forum non conveniens* in various countries, see Fawcett (n 1 above), pp 10–21.

judgments. On the other hand, if the alternative forum has judicial cooperation with China in recognition and enforcement of judgments, such as France, Italy, Hong Kong and Macau, different approaches can be applied. Furthermore, Chinese courts should not be given too much discretion and, as a result, detailed guidance as to the relevant factors and weight attached to each factor should be provided. Finally, the current *forum non conveniens* practice primarily considers procedural convenience, instead of the ends of justice. It is probably consistent with the Chinese policy to respect other country's sovereignty and not to intervene in other countries' internal affairs. However, it is questionable whether justice should never be a relevant consideration. It is suggested that, in exceptional cases, Chinese courts would consider the practicability for the claimant to sue in the alternative forum and refuse to decline jurisdiction if, for example, there is military conflict in that country, or the claimant obviously cannot have a fair trial abroad due to political or religious reasons.